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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. STEPHEN JOSEPH BENNETT, Defendant and Appellant.	G041372 (Super. Ct. No. 06ZF0138) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard F. Toohey, Judge. Affirmed as modified.

Diane Nichols, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Jeffrey J. Koch and William M. Wood, Deputy Attorneys General, for Plaintiff and Respondent.

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I. INTRODUCTION

Late at night on Super Bowl Sunday 2006, four drug users from Oceanside traveled to an apartment complex near the corner of Culver and Michelson in Irvine, intending on meeting drug dealer Brian Gray, aka "P.C." Two of those four men subsequently shot and robbed Gray. The four men were:

-- Brandon Turner, who was certainly one of the shooters, and who was subsequently tried and convicted for first degree special circumstance murder. His appeal is not before us.

-- Deshawn Turner, Brandon's younger brother, who was not one of the shooters, and whose involvement in the events of that night was so minimal (he never left the car) that he was not charged.

-- Stephen Bennett, who, even though he was not one of the shooters, was tried and convicted as an aider and abettor to a special circumstance murder on the theory that he was a "major participant" in the felony who acted with "with reckless indifference to human life." (See Pen. Code, § 190.2, subds. (c) & (d).)

-- Bernard Smith, who was one of the shooters, and who was subsequently tried for first degree special circumstance murder.

Unlike Brandon Turner, who was tried separately, both Bennett and Smith were tried together. This appeal deals with Bennett's conviction as an aider and abettor.

Bennett's challenge is twofold: First, he contends there was insufficient evidence that he was a *major* participant in the shooting or robbery who acted with *reckless indifference* to human life. Second, he argues a jury instruction allowing the jury to consider his past misleading or false statements as indicative of guilt should never have been given. (See CALCRIM No. 362.)

We affirm (though modify the sentence to reflect that a transportation-of-cocaine count should be stayed). As to the first challenge, Bennett heard Turner suggest a robbery of Gray before the quartet left Oceanside. Bennett was the driver, he was the contact person who knew where they all could find Gray, and he was the person who first called Gray when they arrived in Irvine.

The jury instruction question is problematic. Bennett has a good point that the changes in language from CALJIC No. 2.03 to CALCRIM No. 362[1] may indeed create the problem of allowing the jury to treat prior false statements to the police as the "equivalent to a confession, establishing all elements of the charged murder offenses." (See *People v. Crandell* (1988) 46 Cal.3d 833, 871 (*Crandell*).) In particular, the change in language from "prove a consciousness of guilt" in instruction 2.03 to "aware of his guilt of the crime(s)" in instruction 362 undermines the very basis on which our Supreme Court upheld instruction 2.03 in *Crandell*. (See *ibid.* ["A reasonable juror would understand 'consciousness of guilt' to mean 'consciousness of some wrongdoing' rather than 'consciousness of having committed the specific offense charged.'"].)

However, *under the facts of this case*, instruction 362 was appropriate as worded. Bennett's prior false statements readily give rise to the very rational inference that he was aware of his part *in the robbery*.

II. FACTS

On February 5, 2006, Bennett, Smith, Brandon Turner, and Deshawn Turner were in Oceanside at the house of one of their fellow drug addicts, Reuben Avery. With them was Avery's roommate, Rhonda Conner. Avery was a convicted felon and crack addict.[2]

During the get-together, Brandon Turner complained that his parents had just kicked him and his brother Deshawn out of their home. He and Deshawn had nowhere to live and were down to their last two dollars. Brandon Turner concluded that he needed "a lick," that is, to commit a robbery. Somewhere along the conversation,

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[1] From now on all references to "instruction 2.03" will be to "CALJIC No. 2.03," while all references to "instruction 362" will be to CALCRIM No. 362.

[2] To keep the two brothers straight, we will refer to them by their first names only, or by their first and last names. As it turns out, all the major characters in this case have Runyonesque nicknames:
Brandon's was "Squabbles."
Deshawn's was "Youngster."
Bennett's was "Red."
Smith's was "Smitty."
Conner's was "Fat Daddy" or "Big Momma."
Only Avery, at least in this record, appears to have gone without a moniker.

Smith complained that he needed drugs and asked Bennett where he could get some. The group began discussing where they could get drugs, and Bennett said he felt he could "make a killin" selling the drugs. Brandon Turner voiced the idea they should "just take it," i.e., steal the drugs.

Bennett consequently called Gray, an Irvine resident, who was considered a reliable source. (Bennett would later tell a police officer that Gray was a "last minute person." He "never ran out." He was the "one person you can call for drugs.")

Bennett asked Gray for two ounces of cocaine, which is about $1,200 worth. They agreed to meet that night. The plan was for Bennett to call Gray when Bennett got on the freeway.

Bennett invited Avery to go with them, but Avery declined. Avery later remarked to Conner, referring to Bennett: "This dumb ass, you know, going down there to rob P.C. [Gray]." Avery also told police later that "twelve hundred bucks worth of dope is not worth anybody's life[,] especially when you have a kid too." The reference to the "kid" was to the fact that Gray had three children living with him and his girlfriend in her apartment.

That apartment was in a large apartment complex, bounded by the intersection of Culver and Michelson. A carwash was across from the apartment complex via Michelson, and it was also where Bennett usually met Gray when obtaining drugs. That night was no different.

Bennett pulled into the carwash parking lot and called Gray to let him know that he had arrived. Gray asked for a few minutes to get to the carwash parking lot.

A videotape from the carwash captured Bennett's car and Bennett urinating in the parking lot. While Bennett relieved himself, Smith and Turner made their way across Michelson and into Gray's apartment complex.

Gray left his apartment around 11:00 p.m.

We have several eyewitness accounts of the events that transpired. All the witnesses were residents who either heard gunshots or saw Smith and Brandon Turner chasing Gray and shooting at him. One witness was finishing a cigarette in his car. He

saw Gray run past first, followed by Brandon Turner, who was shooting at him, with Smith bringing up the rear.

Another witness heard seven or eight noises that sounded like firecrackers. When he looked outside his window, he saw three men run across his view. The third man slowed down, as if to catch his breath, and yelled "get him" insistently three times, before continuing walking.

A third witness heard gunshots and looked outside her downstairs bedroom window. She saw Gray run by, followed by Smith and Brandon Turner. She "heard a 'very afraid' man scream for security."

This witness also looked outside her upstairs apartment window when she heard a series of gunshots. She saw two men running, and heard one of them saying "Did you pick him? Did you pick him?" with the other responding "The mother fucker is down."

This witness then went downstairs and outside and found Gray lying on the grass, bleeding from gunshot wounds, in front of their apartment building. She called 911.

A fourth witness heard two gunshots and looked outside his window and saw Brandon Turner shooting at Gray, who continued to yell for security. Turner changed the clip on his gun while he was running, "and, after Gray fell down, kept shooting at Gray from about 18 feet away." This witness asked his wife to call 911.

At 11:24 p.m., just three minutes after the fourth witness's call, two police officers arrived at the apartment complex and found Gray unresponsive and without a pulse. The paramedics came and transported him to the hospital. He died in transit from gunshot wounds.

It turned out that Gray had been shot several times. Three bullets were recovered from his body and two bullets had exited his body. One of the wounds consisted of three small pellets.

After gunning down Gray, Smith and Brandon Turner took the drugs from Gray and headed back across the street to the carwash.

Bennett had called Gray again after he was finished urinating, and began to cross Michelson to look for Gray. When Bennett saw Smith and Brandon Turner heading back to the carwash, he turned back before he got to the middle of the street. Smith, Turner, Bennett, and Deshawn Turner, who had never left the car, started back for Oceanside.

By now it was almost midnight. Bennett ended up calling Conner several times to ask for gas and money. She brought him both.

Bennett was arrested on February 16, 2006 en route from Vista to Tucson, Arizona. He was convicted of first degree special circumstance murder while engaged in the commission or attempted commission of the crime of robbery. (See Pen. Code § 190.2, subd. (a)(17)(A)).

For his first degree special circumstance conviction Bennett received a sentence of life without possibility of parole, plus five years for a prior serious felony. For robbery, Bennett was sentenced to 25 years to life, but that sentence was stayed under section 654 of the Penal Code. He was also convicted of transportation of a controlled substance (cocaine), for which he was also sentenced to 25 years to life. (These latter two sentences reflect the operation of the Three Strikes Law.)

III. DISCUSSION

A. *The Aiding and Abetting Issue*

Special circumstance murder based on aiding and abetting liability requires both that the aider and abettor have been a "major participant" in the underlying felony and that the aider and abettor have acted with "reckless indifference" to human life. (See *People v. Proby* (1998) 60 Cal.App.4th 922, 927 (*Proby*) ["In order to support a finding of special circumstances murder, based on murder committed in the course of robbery, against an aider and abettor who is not the actual killer, the prosecution must show that the aider and abettor had intent to kill or acted with reckless indifference to human life while acting as a major participant in the underlying felony."].)

1. Major Participant

In *People v. Smith* (2006) 135 Cal.App.4th 914 (*Smith*), another panel of this court articulated a working definition of "major participant" for purposes of Penal Code section 190.2. A *major* participant in a felony is one who was one of the "more important" members of the group. (See *id*. at p. 928.)

Here, Bennett certainly fits the description. First of all, Gray would still be alive if Bennett hadn't used his contact with Gray to arrange the fatal meeting. Second, only Bennett knew Gray's location. Third, Bennett was the driver who brought the shooters to that location. Fourth, it was Bennett's telephone call to Gray that lured Gray from his apartment.

2. Reckless Indifference

The accepted definition of "reckless indifference to human life" in the special circumstance context is a "'subjective awareness of the grave risk to human life created by'" the defendant's "'participation in the underlying felony.'" (*Proby*, *supra*, 60 Cal.App.4th at p. 928.) As illustrated by three cases, *Tison v. Arizona* (1987) 481 U.S. 137, *Proby*, *supra*, 60 Cal.App.4th 922, and *Smith, supra,* 135 Cal.App.4th 914, a defendant needn't assume a direct violent role in the underlying felony as long as that role is undertaken with a knowledge of a reasonable probability of violence by another actor.

Tison was a prison break-out case. Two brothers' attempted to spring their father and his cellmate from an Arizona prison. Plans for the breakout were made beforehand, but for all we know from the opinion the two brothers simply waltzed into the facility carrying an ice chest full of guns. They were soon able to give weapons to their father and his cellmate -- both convicted murderers -- and thus facilitate the breakout. But the getaway car broke down, so one brother flagged down a passing car while the rest of the group hid by the side of the road. The plan was merely to steal the car. However, when a family of four pulled over to help, the father and his cellmate shot and killed the family.

The United States Supreme Court readily concluded the *brothers* had evidenced a reckless disregard for human life. Wrote Justice O'Connor for the majority: The brothers "subjectively appreciated that their acts were likely to result in the taking of innocent life." (*Tison, supra,* 487 U.S. at p. 152.) After all, they had put weapons into the hands of convicted murderers in a context where the murderers would have plenty of reason to use them.

Proby is an example of how past history can inform a defendant's subjective expectations of possible violence. There, two robbers had done a previous heist at a McDonald's restaurant where one of the robbers locked the employees in the walk-in freezer. When the two robbers attempted a hold-up at another McDonald's, one of them simply executed one of the workers who recognized the robber. Even though the non-shooter robber didn't actually do the shooting, he knew of the shooter's willingness to harm people from the previous robbery. On top of that, the nonshooter had given the shooter the gun that was used to kill the victim. (*Proby, supra,* 60 Cal.App.4th at p. 930.)

Smith is perhaps most similar to the case at bar, since it also involved a drug deal turned violent, though in *Smith* the defendant was a lookout rather than, as here, the driver. The *Smith* case is remarkable because it shows that the jury may conclude a participant in a felony acted with reckless indifference by failing to aid the victim or summon help. (See *Smith, supra,* 135 Cal.App.4th at p. 927.)

Smith involved a robbery of a victim in a motel room by three men. One of the men, Taffolla, merely acted as lookout outside the room. The attack was a particularly brutal one. Wrote Justice Ikola for the court: "Even if Taffolla remained outside Star's room as a lookout, the jury could have found Taffolla gained a 'subjective awareness of a grave risk to human life' during the many tumultuous minutes it would have taken for Star to be stabbed and slashed 27 times, beaten repeatedly in the face with a steam iron, and had her head slammed through the wall. In addition, when [her attacker and Taffolla's confederate] emerged from her room covered in enough blood to leave a trail from the motel to McFadden Street, Taffolla chose to flee rather than going to Star's aid or summoning help." (*Smith, supra,* 135 Cal.App.4th at p. 927.)

Smith applies a fortiori to the case at bar. Here, there was evidence that Bennett knew *before* he drove his fellow addicts to Irvine that at least one of them was planning violence. Moreover, in a recorded conversation Bennett and Smith had together after their arrests, each said that they told the police they knew nothing about anyone being armed -- statements that allow the jury to reasonably infer they *did* know that members of the entourage *were* armed. Brandon Turner's stated desire for a "lick" further gives rise to the reasonable inference that violence was anticipated by Bennett, Smith and Brandon Turner from the very beginning of the drive.[3]

B. Instruction 362

The basic danger in consciousness of guilt instructions are that they might be mistaken by the jury as de facto *conclusive* presumptions of guilt, or otherwise allow an *irrational* leap from a given fact to an inference of guilt. (See generally *County Court of Ulster County v. Allen* (1979) 442 U.S. 140, 157-158 [discussing difference between "permissive" presumptions and "mandatory" ones].) The danger was nicely summarized by Justice Kaufman for our Supreme Court in confronting the defendant's argument in Crandell, supra, 46 Cal.3d at p. 871: "A defendant's 'guilt' being the ultimate determination of the truth or falsity of the criminal charges, the jury might, according to defendant, view 'consciousness of guilt' *as equivalent to a confession, establishing all elements of the charged murder offenses, including premeditation and deliberation,* though defendant might be conscious only of having committed *some form* of unlawful homicide. The instructions thus permitted the jury, defendant maintains, to draw an impermissible inference, without foundation in reason or experience, concerning his mental state at the time of the homicides, thereby violating his federal due process rights." (Italics added.)

The argument, however, was rejected in *Crandell* because it was enough that old instruction 2.03 merely told the jury about a generalized sense of guilt

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[3] *People v. Garcia* (2008) 168 Cal.App.4th 261 has opined that *Smith's* position on testimonial hearsay has been obviated in the light of *Davis v. Washington* (2006) 547 U.S. 813. The issue is irrelevant for our purposes here.

independent of the specific crimes charged, hence old instruction 2.03 was not the "equivalent of a confession." Said the *Crandell* court: "Defendant's fear that the jury might have confused the psychological and legal meanings of 'guilt' is unwarranted. A reasonable juror would understand 'consciousness of guilt' *to mean 'consciousness of some wrongdoing' rather than 'consciousness of having committed the specific offense charged.'* The instructions advise the jury to determine what significance, if any, should be given to evidence of consciousness of guilt, and caution that such evidence is not sufficient to establish guilt, thereby clearly implying that the evidence is not the equivalent of a confession and is to be evaluated with reason and common sense. The instructions do not address the defendant's mental state at the time of the offense and do not direct or compel the drawing of impermissible inferences in regard thereto." (*Crendell, supra,* 46 Cal.3d at p. 871, italics added.)[4]

As noted above, the language change from instruction 2.03 to instruction 362 are problematic, since the new instruction does not allow for the generalized sense of wrongdoing as distinct from specific crime by which our Supreme Court justified the old instruction in *Crandell*. We will therefore not attempt to articulate a *blanket* approval of instruction 362. (Cf. *People v. McGowan* (2008) 160 Cal.App.4th 1099, 1104 [describing differences between instructions 2.03 and 362 as "minor" but not addressing change from consciousness of guilt to awareness of crimes charged].)

That said, in this case, the danger of an irrational leap from the fact of a false statement to a conclusive finding of all the elements of a crime charged is not present.

First, let us itemize Bennett's false statements:

He first denied all knowledge of events.

He admitted knowing Gray, but said he knew nothing of the killing.

He said he was at the carwash, but said Gray did not show up.

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[4] *People v. Crayton* (2002) 28 Cal.4th 346, 364-365 opined that *Crandell* may have "misleadingly overstate[d]" the effect of a counsel advisement statute (Pen. Code, § 987), which gets Crandell a red flag or pennant in the online case databases. As with *Smith*, the point is irrelevant to this case.

He denied Conner brought him gas and money for more gas.

He told contradictory stories about when he learned of Gray's death -- either on the way back from Irvine or before the police interview.

As the Attorney General points out, instruction 362 allows, in the context of this case, for the perfectly rational inference that Bennett was conscious of his role in a *robbery* as distinct from an otherwise nonviolent drug deal. In particular, his false statements as to Gray not showing up and the time of learning of Gray's death permit a rational inference of Bennett's consciousness of *danger to Gray* that transcended Gray's merely being a drug supplier about to make a sale.

Not to mention the fact that Bennett knowing Brandon Turner wanted to rob somebody, which leads to our final conclusion: Any arguable error in giving instruction 362 here was harmless. Indeed, Bennett heard Avery's comment about the possibility Gray would lose his life before he traveled to Irvine as well as Brandon Turner's "lick" comment. There was also no doubt that Bennett drove the car and was the contact person to locate Gray, and it was a very reasonable inference that he knew beforehand that Brandon Turner was armed. The fine metaphysical distinction between generalized consciousness of wrongdoing (approved in *Crandell*) and consciousness of the crimes charged (here, per instruction 362) is lost in the avalanche of such evidence.

C. Stipulated Stay of the
Controlled Substance Transport Sentence

As noted, in sentencing Bennett, the trial court imposed a concurrent sentence upon him for transportation of a controlled substance of 25 years to life for the transportation of cocaine. The Attorney General agrees with Bennett that this sentence should be stayed. We modify his sentence accordingly.

IV. DISPOSITION

The judgment is hereby modified to provide that the sentence of 25 years to life for the transportation of cocaine is stayed. In every other respect, the judgment is affirmed.

SILLS, P. J.

WE CONCUR:

ARONSON, J.

IKOLA, J.